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UNITED OVERSEAS BANK LTD v. THE OWNERS AND/OR DEMISE CHARTERERS OF AND/OR OTHER PERSONS INTERESTED IN THE SHIP OR VESSEL "LIMIN ROSMINA"; PETRONAS CARIGALI SDN BHD (INTERVENER)

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HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[ADMIRALTY IN REM NO: WA-27NCC-1-01-2022]
15 JUNE 2023

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Abstract – *The sheriff can accept a bid that was made in the first round of tenders under the order for sale after a second round of tenders had been proceeded with. The second round of tenders does not have the effect of causing a rejection of the bids received during the first round of tenders. Additionally, based on justified circumstances, the sheriff has powers to sell a vessel below the appraised value if the offer is still valid, open and capable of acceptance.*

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CIVIL PROCEDURE: *Admiralty – Action in rem – Order for sale of vessel by private treaty or public auction – First and second rounds of bids did not meet appraised value of vessel – Whether sheriff could accept bid that was made in first round of tenders under order for sale after second round of tenders had been proceeded with – Whether second round of tenders had effect of causing rejection of bids received during first round of tenders – Whether in best interest of parties for vessel to be sold to highest bidder even if at undervalue*

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MARITIME LAW: *Action in rem – Order for sale of vessel by private treaty or public auction – First and second rounds of bids did not meet appraised value of vessel – Whether sheriff could accept bid that was made in first round of tenders under order for sale after second round of tenders had been proceeded with – Whether second round of tenders had effect of causing rejection of bids received during first round of tenders – Whether in best interest of parties for vessel to be sold to highest bidder even if at undervalue*

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The plaintiff was a mortgagee who had obtained summary judgment against the defendant for the sum of USD2,794,278.82, being the amount due and owing by the defendant to the plaintiff. The defendant failed to satisfy the judgment sum. The court ordered for the vessel to be appraised and sold by the sheriff by private treaty or public auction. The vessel was accordingly surveyed and appraised and a report was provided to the sheriff on a confidential basis. Following that, a notice was advertised and six bids were received but none met the appraised value of the vessel ('first round of bids'). The court then ordered, *inter alia*, that the sheriff be at liberty to receive a second round of bids ('encl. 112'). However, the court did not authorise the sheriff to reject any bids from the first round of bids. Only one bid was received but, again, it did not meet the appraised value of the vessel. Given that the bids across the first and second rounds did not meet the market

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valuation of the vessel, the same was yet to be sold by the sheriff. The plaintiff wrote to the sheriff, requesting the latter to consider accepting the bid from Aussie Offshore Pte Ltd. However, the sheriff stated that (i) the first round of bidding had been concluded after the rejection of the first round of bids and the first round of bids could no longer be used after the second round of bids; and (ii) upon going for a second round of tenders, the offers from the first round of tender had been 'rejected' on the basis of contract law. The plaintiff had since reached out to the three highest bidders across the first and second rounds of tenders. ARC Offshore India ('ARC'), being the third highest bidder across the first and second rounds of bids, confirmed its interest in continuing with the sale of the vessel at the price of RM6,399,999. Hence, the present application by the plaintiff for leave of the court to proceed with the sale and for the approval of the sale to ARC ('encl. 118'). Objecting to the plaintiff's application, the defendant argued that the vessel ought to be sold to Proactive Ship Management Pvt Ltd ('PSM') as it was ready to offer an 'indicative sum' in the range of RM7 million for the vessel. The issues that arose for adjudication were: (i) whether the 'offer' from PSM should be considered as an available bid to be accepted; (ii) whether the offer from ARC was still valid, open and capable of acceptance; and (iii) whether a sale below the appraised value of the ship was justified in the circumstances.

Held (granting order in terms of encl. 118):

(1) The defendant's invitation to this court to sell the vessel to PSM, for a price of RM7 million, was 'gazumping'. It was detrimental to the fair administration of justice and raised doubts over the transparency of the judicial sale process. PSM's 'offer' was not one which the court should consider, save only in the contest of determining whether a further round of bids should be called for to allow PSM to join the established judicial sale process. (paras 19 & 20)

(2) The second round of tenders did not have the effect of causing a rejection of the bids received during the first round of tenders (inclusive of the offer from ARC). The advertisement for the second round of tenders, the wording of which was approved by the court in encl. 112, was also prefaced with words that indicated continuity from the first round of tenders and did not cause a rejection of the earlier bids. Enclosure 112, which authorised the sheriff to receive further bids in the second or more rounds of bidding, did not authorise the sheriff to reject bids validly received in the first rounds. The sheriff had not done anything objectively inimical to the validity of the offers received as expressly rejecting the offer. The offer from ARC was valid, open and capable of being accepted by the sheriff. (paras 51-54)

(3) The circumstances in the present case justified a decision to permit the sale of the vessel based on the said offer. Given that the bids across the first and second rounds of tenders did not meet the market valuation of

A the vessel, the same had yet to be sold by the sheriff and, as such, continued to incur the sheriff's costs for maintenance of the same. It was in the best interest of all parties that the vessel be sold to the highest bidder across the first and second rounds of tenders at an undervalue. The sheriff was directed to accept the bid received from ARC while the
B offer was still open. (paras 55, 58 & 62)

Case(s) referred to:

Bank Of New Zealand (Security Trustee) v. The Vessel MY "Island Escape" (No 2) [2023] FCA 101 ***(refd)***

Dan-Bunkering (Singapore) Pte Ltd v. The Ship Yangtze Fortune (No 2) [2023] FCA 148
C ***(refd)***

Fratelli Cosulich Bunkers (HK) Ltd v. The Owners And/Or Demise Charterers Of The Ship Or Vessel "FAIR WIND 28" [2008] HKFC 356 ***(dist)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Pratt Contractors Ltd v. Transit New Zealand [2003] UKPC 83 ***(refd)***

Shandel v. Jacobs And Another 1949 (1) SA 320 (N) ***(refd)***

D *The "Turtle Bay" [2013] SGHC 165* ***(dist)***

For the plaintiff - Abd Azim Abd Razak & Prabjit Dev Singh Mohan Singh; M/s Rahmat Lim & Partners

For the defendant - Teoh Oon Teong, Philip & Lim Wai Yee; M/s Azmi & Assocs

E *Reported by Najib Tamby*

JUDGMENT

Ong Chee Kwan J:

Introduction

F **[1]** This is the plaintiff's application under encl. 118, among others, for leave of this court to proceed with the sale of the Limin Rosmina ("vessel") to one ARC Offshore India Pte Ltd ("ARC Offshore India") for the sum of RM6,399,999, which is below the appraised value of the ship conducted pursuant to the order dated 24 November 2022 ("encl. 89") and for approval
G of the sale.

[2] This case raises an interesting question as to whether the sheriff can accept a bid that was made in the first round of tenders under the order for sale after a second round of tenders had been proceeded with.

H **Background Facts**

[3] The plaintiff is a mortgagee who has obtained summary judgment against the defendant herein *vide* encl. 65 dated 25 July 2022 for USD2,794,278.82 (which is equivalent to RM11,752,736.72 based on the exchange rate of USD1 = RM4.206 as at 27 January 2022) being the amount
I due and owing by the defendant to the plaintiff as of 13 January 2022. It is not disputed that the defendant has failed to satisfy the judgment sum.

[4] *Vide* encl. 77, this court had on 19 September 2022 ordered for the vessel to be appraised and sold by the sheriff by private treaty or public auction if he receives an offer equal to or more than the appraised value of the vessel. *Vide* encl. 89 dated 24 November 2022, M3 Marine Offshore Brokers Pte Ltd ("M3ME") was appointed as the surveyor and appraiser for the vessel. M3ME had surveyed and appraised the vessel on 14 December 2022 and the survey and appraisal report was provided to the sheriff on or about 21 December 2022 on a confidential basis.

[5] Thereafter, *vide* encl. 102 dated 10 January 2022, this court approved the terms of the "sheriff's terms and conditions for sale" and ordered for the notice of the sale of the vessel and its bunkers to be advertised (*ie*, the first round of tenders). The notice was advertised and by the deadline for receipt of bids on 7 February 2023, six bids were received. However, all the bids did not meet the appraised value of the vessel.

[6] Thereafter, *vide* encl. 112 dated 6 March 2023, this court ordered among other things, that the sheriff be at liberty to receive a second round of bids (or as many rounds of bids thereafter as may be deemed necessary by the sheriff) in respect of the sale of the vessel and bunkers and for the sale to be advertised. Notably, this court did not authorise the sheriff to reject any bids from the first round in the course of receiving the second round of bids.

[7] The notice for second round of bids was advertised and by the deadline for receipt of bids on 30 March 2023, only one bid was received which also did not meet the appraised value of the vessel.

[8] Given that the bids across the first and second rounds of tenders did not meet the market valuation of the vessel as contained in the survey and valuation, the vessel has yet to be sold by the sheriff.

[9] The plaintiff was of the view that the vessel should be sold below its appraised value to the highest bidder across the first and second rounds of bidding, subject to confirmation of interest in continuing with the sale of the vessel.

[10] The plaintiff wrote to the sheriff on 5 April 2023 *vide* encl. 113 to request the sheriff to consider accepting the bid from Aussie Offshore Pte Ltd for RM6,562,697. However, the sheriff raised concerns on the ground that the first round of bidding had been concluded after the rejection of the first-round bids and the first-round bids (which would include that of ARC Offshore India) could no longer be used after the second round of bidding. Thereafter, during the 12 April 2022 appointment, the sheriff had informed the plaintiff that upon going for a second round of tender, the offers from the first round of tenders had been 'rejected' purportedly 'on the basis of contract law'.

[11] Further, the plaintiff has since reached out to the three highest bidders across the first and second rounds of tenders, however only ARC Offshore India (being the third highest bidder across the first and second rounds) has confirmed its interest in continuing with the sale of the vessel at a price of RM6,399,999.

[12] Accordingly, *vide* encl. 118, the plaintiff sought leave of this court for leave to proceed with sale and for approval of the sale to ARC Offshore India.

[13] The only source of opposition to the plaintiff's application is the defendant, who suggested that the vessel be instead sold to one Proactive Ship Management Pvt Ltd ("Proactive Ship Management"). The defendant based its position on a letter issued by Proactive Ship Management stating that it is ready to offer an "indicative sum" in the "range" of RM 7 million for the vessel.

Issues For Determination

[14] The plaintiff submitted that the sheriff has powers to sell the vessel to ARC Offshore India for the sum of RM6,399,999 which is below the appraised value of the ship. The plaintiff further contended that the 'offer' by Proactive Ship Management ought to be rejected as the said company had not submitted any bids, neither in the first nor the second rounds of tenders.

[15] The application attracts the following interesting legal questions:

(i) whether the "offer" from Proactive Ship Management should be considered by this court as an available bid to be accepted?

(ii) whether a sale below the appraised value of the ship is justified in the circumstances?

(iii) whether the offer from ARC Offshore India is still valid, open and capable of acceptance?

[16] Each of the legal questions shall be considered in turn.

Whether The "Offer" From Proactive Ship Management Can Be Considered As An Available Bid To Be Accepted

[17] The starting point to consider the "offer" from Proactive Ship Management is to recognise that it has never gone through the bidding and therefore stands outside the established bidding process authorised by this court. This is a significant fact.

[18] In this respect, the observations of the Australian Federal Court in *Bank Of New Zealand (Security Trustee) v. The Vessel MY "Island Escape" (No 2)* [2023] FCA 101 are apposite:

[35] It follows from the above that the Marshal's duty to obtain the best possible price for the ship does not authorise her to depart from the equally important duty to conduct a fair sale process. That is so, even if such a departure would or may realise a higher price on the sale of the ship.

…

[49] A person submitting a tender in response to an invitation of the Marshal to offer to purchase a ship in a closed bid sale would have an expectation that if that person is the highest bidder, absent a proper reason and direction of the Court, that person's bid will be accepted on or before the time by which the offer expires. Where the highest bid is below a valuation the Marshal has obtained for the ship, it may be expected and fair for the Marshal to seek a direction that the highest bid not be accepted if an alternative sale process is considered likely to yield a higher price. However, a party submitting a tender below the Marshal's valuation would not expect the Marshal, acting fairly, to depart from the closed bid tender process and embark on a different sale process (by private treaty or otherwise) before the closed bid tender process was completed in accordance with its advertised terms. That is, it would not be fair to parties, who have accepted the Marshal's invitation to tender in a closed bid tender process, for the Marshal to commence negotiations with selected tenderers or other parties who had not submitted tenders with a view to making an agreement for the sale of the ship by private treaty before the date for acceptance of tender offers has expired.

[50] Maintaining public confidence in the Marshal and the Court and the impartiality and transparency of a judicial sale is paramount. Potential purchasers engaged in a closed bid tender process should be able to make their best offer with confidence that if it is the highest offer in the process it will either be accepted or not, but it will not be open to 'gazumping' after the bid period has closed and before the period of the open offer has expired. The Marshal's and the Court's reputation would be tarnished by a departure from the closed bid tender process. It would also erode confidence in the process and may lead potential purchasers in future judicial sales either to not participate because the process may no longer be considered 'fair' or to under-bid in the hope or expectation of becoming involved in a subsequent negotiation and sale by private treaty.

[19] Leaving aside the uncertainty as to the firmness of Proactive Ship Management's "offer", the defendant's invitation to this court to sell the vessel to Proactive Ship Management for a price of RM7,000,000 is exactly that – "gazumping". It is detrimental to the fair administration of justice and raises doubts over the transparency of the judicial sale process.

[20] Accordingly, I agree with learned counsel for the plaintiff that the Proactive Ship Management's "offer" is not one which this court should consider, save only in the context of determining whether a further round of bids should be called for to allow Proactive Ship Management to join the established judicial sale process.

[21] Learned counsel for the defendant did not dispute that the 'offer' from Proactive Ship Management did not go through the first and or second rounds of tenders. However, it is contended that with the second round of tenders, all the bids in the first round of tender had effectively been rejected and or come to an end. Thus, if the sheriff is considering the 'bid' by ARC Offshore India, this constitutes a 'new' offer and ought to be treated as a sale by private treaty and the 'offer' by Proactive Ship Management would stand in the same footing and by reason thereof, the sheriff ought not to be precluded from considering the 'offer'.

[22] The aforesaid will depend on the legal effect, if any, of the second round of tenders *vis-à-vis* the validity of the bids submitted in the first round of tenders and whether the sheriff is entitled to accept the offer by ARC Offshore India notwithstanding that as at the date of the hearing of this application, the period for the bids remaining open for acceptance under the "sheriff's terms and conditions of sale" has already lapsed.

[23] I will deal with this below.

The Offer From ARC Offshore India Is Valid, Open And Capable Of Acceptance

[24] As alluded to above, after the sole bid under the second round of tenders was opened, the plaintiff wrote to the sheriff on 5 April 2023 *vide* encl. 113 to request the sheriff to consider accepting the bid from Aussie Offshore Pte Ltd for RM6,562,697. However, the sheriff raised concerns on the ground that the first-round of bidding had been concluded and with the second round of bidding, the first round bids (which would include that of ARC Offshore India) could no longer be used. More specifically, the excerpt of the sheriff's response is copied below:

Peguam,
Bidaan pertama telah dimuktamadkan setelah kita menolak bidaan pembida. Maka tidak boleh digunapakai untuk bidaan kedua ini.
Sila ambil maklum perkara ini.
UALA LUMPUR
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... PLAINTIF
AN/ATAU
AP
MOHD ZAMIR SUHAIMEE
Timbalan Pendaftar
Mahkamah Tinggi Malaya
Kuala Lumpur

[25] Thereafter, during the 12 April 2022 appointment, the sheriff informed the plaintiff that upon going for a second round of tender, the offers from the first round of tender have been rejected purportedly on 'the basis of contract law'.

[26] Learned counsel for the defendant shared the same view as the sheriff and referred to the *obiter dicta* of Hon Waung J in the Hong Kong case of *Fratelli Cosulich Bunkers (HK) Ltd v. The Owners and/or Demise Charterers of the Ship or Vessel "FAIR WIND 28"* [2008] HKFC 356; HCRAJ 88/2007 ("*Fratelli*'s case"), where in that case, the Hong Kong court had already accepted the first bid and therefore it considered itself bound by the result of the first bid. In expressing his view on the difficulty in deciding whether to order a second round of tender, Hon Waung J stated as follows:

> 6. The court therefore was put in the difficult position of deciding whether to order the second round of tender with no certainty that even the previous $2.4 million would be reached because **once a second round was ordered, of course, the first bid would have lapsed,** or alternatively to do the best it can and accept the only offer that was available.
>
> (emphasis added)

[27] The defendant relied on the *obiter dicta* in *Fratelli*'s case for the proposition that "once a second round was ordered […] the first bid would have lapsed".

[28] With respect, the *Fratelli*'s case does not establish or decide on any general proposition of law in respect of the effect of a second round of tenders on bids received during the first round. In this regard, the *Fratelli*'s case can be distinguished because:

(i) the proposition relied on by the defendant is *obiter dicta*. In the *Fratelli*'s case, the chief bailiff had accepted the sole bid received from the sole round of public tender and cashed in the 10% deposit although that bid was very much below the appraised value of the vessel. Thereafter, the plaintiff issued a letter stating that the bid was grossly below the value that could be realised, that there was a mortgage to be realised and that there was in fact a new bidder who was ready and willing to bid at a higher price. The Hong Kong court of first instance was called on to decide what to do in the circumstances with the new bid given that it had accepted the earlier bid. The court decided that since it had accepted the first bid, its hands were tied and could not act on the subsequent bid;

(ii) the court was not called on to formally decide on the effect that a second round of tenders would have on bids received during the first round. In fact, no submissions were made by parties on this point. Therefore, the proposition at para. 6 of the *Fratelli*'s case cannot be relied on as authority.

[29] In fact, the *Fratelli*'s case itself recognises that the conditions of sale will take precedence and determine or regulate the sale process. In this regard, the court held:

> [16] Before the court accepts the UDL bid there was always a possibility of something being done, but once the court accepted the bid, then the court's hand is tied. The court has made a bargain and that seems to me is the crucial aspect of what has gone wrong. *The plaintiff, if it wished to make any application before the sale, it could ask for example to have special conditions attached to the order for sale. The order for sale of course has a safeguard. The safeguard is to make sure that if there is a bid that comes in below the appraised value, the court then would have to look at it and can order sale by special treaty.* Unfortunately, the situation was such that the court had no alternative but to accept the bid. It seemed to the court to be the right thing to do given those circumstance so I do not regret what had taken place. I make no apologies. It is unfortunate that this has happened, but in the circumstance, it seems to me that both as a matter of public policy and as a matter of following the procedure of the court, that the court has agreed to the selling the vessel to the only bidder of UDL at $2.4 million and this sale therefore must go forward. I hereby direct that the chief bailiff completes the sale on 25 April as scheduled. (emphasis added)

[30] This position is supported by the decision of the Natal Provincial Division Court of South Africa in *Shandel v. Jacobs And Another* 1949 (1) SA 320 (N) ("*Shandel*'s case") which held:

> The questions that arise are, I think, two-fold:
>
> (a) *Do the conditions of sale constitute a contract between the auctioneer and a bona fide bidder for any article which is put up?*
>
> (b) […]
>
> It seems to me that the first question must be answered in the affirmative. In the case of *Estate Francis v. Land Sales (Pty.), Ltd. and Others* (1940 NPD 441 at p. 457) BROOME, J., said:
>
> > *An auction is a form of competitive bargaining with the object of a contract of sale resulting carried out in accordance with certain rules. These rules are the conditions of sale. They are framed by the seller to represent the terms upon which he is prepared to submit his property to competition. They are, so to speak, the rules of the game and they bind all the players.*
> >
> > In the present case, the conditions announced at the auction bound the auctioneer in the same way as, in the view of the CHIEF JUSTICE, his advertisement would. They form the basis upon which a bidder at the sale would bid for the article. *As soon as a bid is made bona fide to the auctioneer, the conditions create a contractual relationship between the bidder and the auctioneer.* In his argument, Mr. Caney contended that there was no nexus of any kind between the bidder and the auctioneer. I do not agree with that view. Upon the principle laid down by the CHIEF JUSTICE in *Neugebauer*'s case *there exists, when a bona fide bid is made, the germ of a contract.*

> It is true that the English case and the Appellate Court decision to which I have referred were dealing with the sale without reserve. *But this fact does not affect the principle applicable to the present case, namely, that all the conditions of the sale form a contractual relationship between the auctioneer and the bidding public.* (emphasis added)

[31] It is important to note that the conditions for sale (if any) that applied in the *Fratelli*'s case are not discernible from the grounds of judgment. Therefore, it is unclear what led the Hong Kong court of first instance to decide as it did in para. 6 of the grounds of judgment. Lacking such material, this court should exercise caution in relying on the proposition submitted by the defendant as a general proposition of law.

[32] Taking heed from the principle that the conditions of sale will take precedence and determine or regulate the sale process, the following documents will take precedence and determine or regulate the bidding process in our case:

(i) enclosure 77, *ie*, the order for sale;

(ii) the "sheriff's terms and conditions for sale", duly approved by this court in encl. 102, and in particular cls. 3 and 10 which expressly notify interested parties that the sheriff may proceed with further rounds of bidding without prejudice to the validity of the original offers; and

(iii) enclosure 112 *ie*, the order granting the sheriff liberty to receive a second round of bids (or as many rounds of bids thereafter as may be deemed necessary by the sheriff),

Notably, none of these documents stipulates that by going for a second round of tenders the bids from the first round of tenders will be rejected.

[33] It is not disputed that at the time the second round of tenders was conducted and the sole bid received on 30 March 2023, the offers made in respect of the bids under the first round of tenders were still well within the validity period for acceptance. Under cls. 3 and 10 of the "sheriff's terms and conditions for sale", the offers are to remain open for acceptance for three months from the close of the deadline for receipt of bids on 7 February 2023 *ie*, on 7 May 2023.

[34] When the court made the order *vide* encl. 112 dated 6 March 2023 that the sheriff be at liberty to receive a second round of bids (or as many rounds of bids thereafter as may be deemed necessary by the sheriff) in respect of the sale of the vessel and bunkers and for the sale to be advertised, there was no order authorising the sheriff to reject the bids received under the first round of tenders. Indeed, there is no evidence before this court that notices were issued by the sheriff to the bidders rejecting their respective offers.

[35] To my mind, the legal effect of cls. 3 and 10 of the "sheriff's terms and conditions for sale" is that the offers from the bidders, unless otherwise rejected, stand irrevocable for acceptance by the sheriff for a period of three months from the deadline for the closing of receipts of the bids. Thereafter, the sheriff has no powers to accept the offers unless the bidders are prepared to extend the validity of their offers.

[36] The fact that the court had ordered for a second round of tenders without more does not affect the integrity of the first round of tenders and the validity of the offers made by the bidders thereunder.

[37] Learned counsel for the plaintiff referred this court to the New Zealand Court of Appeal case of *Pratt Contractors Ltd v. Transit New Zealand* BC9860748 (8 June 1998, unreported) ("*Pratt Contractors'* case"). This was a non-shipping case but is cited for the principles stated therein. In that case:

(i) the respondent conducted a first round of tenders. The conditions of tender read as follows:

> 107.1 The lowest or any tender will not necessarily be accepted. The Principal reserves the right to reject all tenders.
>
> 108.1 *If no tender has been accepted within two months after the closing of tenders, each tenderer shall be notified in writing by the Principal or his agent whether his tender is or is not still under consideration.* Tender rates and prices shall remain fixed and valid for acceptance for two calendar months unless otherwise stated in the tender documentation. (emphasis added)

(ii) tenders closed on 18 March 1997 and on 6 June 1997 (*ie*, more than two months after the closing of tenders) the respondent wrote to all tenderers to seek confirmation whether their tender rates would still be valid up until 20 June 1997;

(iii) in this regard, one tenderer confirmed that their tender was still valid, however two other tenderers took the position that all tenders were no longer valid. The respondent then took legal advice and was advised that the first tender round was over and that it had to commence a second tender round (which was later held to be erroneous). The court set out the facts as follows:

> Pratt confirmed its tender by letter dated 9 June 1997. However, two other tenderers responded in different vein to Transit. One wrote:
>
> > We now consider that Transit New Zealand can not accept any tender for the above project as the allowable period for acceptance has expired and that all tenders must be rejected and new tenders called.

Another wrote:

> Thus and in accordance with clause 107.1, the principal will have to (as he reserves the right to) reject all tenders. This contract will have to be re-let.

Both those tenderers referred specifically to cl 108.1 and noted that as the tenders had closed on 18 March 1997 they took the view that they were only valid for acceptance for two calendar months, *ie* to 18 May.

Transit took legal advice and, as a result, Transit took the view that the first tender round was over and that it had to commence a second tender round. (emphasis added)

(iv) in respect of that legal advice, the New Zealand Court of Appeal held as follows:

> *In this court Pratt first sought to establish the Master had incorrectly interpreted cl 108.1. […]*
>
> Because of our overall view of the matter, we do not need to enter into detail about the correct interpretation of cl. 108.1 or upon whether Pratt would have been awarded the contract in the first tender round. *As we do take a different view from the Master on the proper interpretation of cl 108.1,* we briefly note it.
>
> *We accept Pratt's argument it was open to Transit to have continued with the first tender round as tenders remained open until withdrawn. Clause 108.1 provided a minimum period for tenders to remain open and not a fixed period. If tenderers did not want to be bound by their tenders after two months from the close of tenders, they had to so advise Transit.* Transit was obligated to advise tenderers whether their tenders were still under consideration at the end of the two months from the close of tenders. Any tenderer would then have been entitled to that information. (emphasis added)

[38] Relying on the *Pratt Contractors'* case, learned counsel for the plaintiff submitted that tenders remain open until they are withdrawn by tenderers. This is the case even if the conditions of tenders stipulate a minimum period for tenders to remain open as in our present case. It should be noted that the New Zealand Court of Appeal's decision was upheld on appeal to the Privy Council in *Pratt Contractors Ltd v. Transit New Zealand* [2003] UKPC 83; 100 ConLR 29. The Privy Council considered, among others, as follows:

> [29] By the time these discussions had reached a point at which Mr Taylor was willing to take his chance on Pratt and award it the contract, the two-month period for acceptance of tenders (under cl. 108.1 of the general conditions) had passed. *Mr Taylor sought legal advice and was told (wrongly, as the Court of Appeal subsequently held in summary judgment proceedings: see Pratt Contractors Ltd v. Transit New Zealand (8 June 1998, unreported)) that he could not accept Pratt's tender unless all the tenderers were willing to confirm that their*

A *tenders were still open to acceptance.* Two would not, so Mr Taylor decided to exercise Transit's power under condition 107 to reject all tenders and re-advertise. (emphasis added)

[39] Drawing similarities with the *Pratt Contractors'* case, learned counsel for the plaintiff submitted that cls. 3 and 10 of the "sheriff's terms and
B conditions of sale" also provide that offers received shall remain open for acceptance for a period of three months from the date the bidding closes.

[40] Following the *Pratt Contractors'* case, learned counsel for the plaintiff contended that the offers by the bidders in the first round of tenders may still be accepted even after the expiry of three months from the closing deadline
C for the receipt of the bids unless withdrawn by the tenderer. Hence, that ARC Offshore India's offer remains open for acceptance beyond 7 May 2023 (*ie*, three months from the deadline for receipt of bids on 7 February 2023).

[41] With respect, I do not agree.

D **[42]** To my mind, the reason why the New Zealand's Court of Appeal formed the view that the offers had remained valid notwithstanding the expiry of the two months after the close of the tender is because under the condition 108.1, it was expressly provided that "If no tender has been accepted within two months after the closing of tenders, each tenderer shall
E be notified in writing by the principal or his agent whether his tender is or is not still under consideration". This means that unless otherwise notified, the offers shall remain valid. If the tenderers wish to withdraw their offers, they have to expressly inform the principal or his agent.

[43] Clauses 3 and 10 of the "sheriff's terms and conditions of sale" in our
F present case however are worded differently. They provide that the offers are to remain open for acceptance for three months from the deadline of the closing date for the receipt of bids. This must necessarily mean that after the said three months, the offers are no longer open for acceptance by the sheriff. However, this does not at all mean that the sheriff cannot approach the
G bidders to extend their offers as long as steps are taken to ensure that the propriety and integrity of the judicial sale is not compromised. The court must continue to retain control over the sale process and the confidence and standing of the judicial sale must not in any way be adversely affected.

[44] In this regard, it should be noted that in the present case, the plaintiff
H has since reached out to the three highest bidders across the first and second rounds of tenders, however only ARC Offshore India (being the third highest bidder across the first and second rounds) has confirmed its interest in continuing with the sale of the vessel at a price of RM6,399,999.

[45] ARC Offshore India has also *vide* their letter dated 2 June 2023,
I affirmed that their offer is still open and has even extended its period of validity for this court's consideration.

[46] In fact, it is not unusual in a judicial sale for the sheriff to proceed to accept the second highest bid in the event that the sale based on the highest bid that was earlier accepted, had for some reasons failed to materialise. A

[47] An example of one such instant in the Australian Federal Court case of *Dan-Bunkering (Singapore) Pte Ltd v. The Ship Yangtze Fortune (No 2)* [2023] FCA 148 ("*Yangtze Fortune*'s case"). In the *Yangtze Fortune*'s case, the Australian admiralty marshal accepted the bid from the highest bidder from the tender process, however the highest bidder was unable to make payment of the deposit by the deadline stipulated in the conditions of sale and the marshal agreed to extend the time for payment. The highest bidder thereafter informed the marshal that it could not guarantee that the deposit will be received by the deadline and inquired whether proof of remittance followed by SWIFT confirmation the next day would be acceptable. The marshal agreed and advised that she is also agreeable to extend the time for payment for the balance price. By the deadline, the highest bidder had yet to submit its proof of remittance and the marshal applied to court to terminate the contract for breach of contract and seek authorisation to accept the bid of the second highest bidder and this was consequently allowed by the court. B C D

[48] It is discernible from the *Yangtze Fortune*'s case that despite the amendments or variations to the conditions of sale by granting extensions of time for payment, the court still considered the bids from the highest bidder and thereafter the second highest bidder as being part of the same judicial sale process and it did not affect its nature as a valid bid received in the normal course of the established bidding process. E

[49] Similar to the *Yangtze Fortune*'s case, it is clear that the status or nature of the offer from ARC Offshore India as being a valid bid received in the normal course of the established bidding process is not affected by the fact that: (i) a second round of tenders was invited; and (ii) that ARC Offshore India has agreed to keep their offer open for a further period for this court's consideration. F

[50] Accordingly, I am unable to agree with learned counsel for the defendant that the sale to ARC Offshore India in this case, if leave is granted, is a sale by private treaty and not a judicial sale under the order dated 19 September 2022 and based on the "sheriff's terms and conditions of sale". G

[51] In respect of the second round of tenders, it does not have the effect of causing a rejection of the bids received during the first round of tenders (inclusive of the offer from ARC Offshore India). Notably, the advertisement for the second round of tenders (the wording of which was approved by this court *vide* encl. 112) is also prefaced with the following words, which indicate continuity from the first round of tenders and does not cause a rejection of the earlier bids: H I

A

> A **[Second] Round Of Offers Are Invited** for the purchase of the ship or vessel "LIMIN ROSMINA" (IMO No: 9703186)
>
> (emphasis added)

[52] Enclosure 112 which authorises the sheriff to receive further bids in the second or more rounds of bidding does not authorise the sheriff to reject
B bids validly received in the first round. The relevant portion reads as follows:

> That the sheriff **be at liberty to receive a 2nd round of bids (or as many rounds of bids thereafter as may be deemed necessary by the sheriff)** in respect of the sale of the ship or vessel "Limin Rosmina" (the "Vessel") and the unused fuel, lubricants and other consumables remaining on
C board the Vessel (collectively referred to as the "Bunkers")
>
> (emphasis added)

[53] More specifically, the sheriff has not done anything objectively inimical to the validity of the offers received such as expressly rejecting the offer. In this regard, the mere expression of views by the sheriff as to the legal
D status of the bids from the first round as set out in para. 23 above does not amount to a rejection of the offers.

[54] For the aforesaid reasons, I hold that the offer from ARC Offshore India is valid, open and capable of being accepted by the sheriff pursuant to the order for judicial sale of the vessel dated 19 September 2022.

E

The Sale Of The Vessel Below Its Appraised Value Is Justified In The Circumstances

[55] The offer by ARC Offshore India is below the appraised value. Notwithstanding the aforesaid, it is my judgment that the circumstances in
F the present case justify a decision of this court to permit the sale of the vessel based on the said offer.

[56] The rationale for conducting a judicial sale by way of appraisement, advertisement and requiring interested parties to put in their sealed bids was considered by the Singapore High Court in *The "Turtle Bay"* [2013] SGHC
G 165 ("*The Turtle Bay*") as follows:

> [17] To protect the interests of all persons with *in rem* claims against the vessel including the defendant ship owner, the court has to have entire control over the sale process thereby safeguarding the propriety and integrity of the sale process and, ultimately, instilling
H confidence and standing of the judicial sale from this jurisdiction. *To this end, there are comprehensive procedures in O. 70 for a court-ordered judicial sale to be carried out by the Sheriff pursuant to a commission for appraisement to ascertain the value of the vessel, by the placement of advertisements and invitation to submit bids for the purchase of the vessel.*
>
> I [18] *Once the Sheriff is commissioned to appraise and sell the vessel, he is under a duty to first appraise the vessel to ascertain the value.* The Sheriff would be assisted by professional and experienced appraisers who as court

appointed appraisers have to act faithfully and impartially. The amount of the appraised value is kept confidential so as not to affect the price at which bids are received. *Ordinarily, the Sheriff would accept the highest bid price unless it is below the appraised value. When the court is asked to exercise its discretion to approve a judicial sale where the highest bid price is below the appraised value, the Sheriff hands over the confidential appraisement report of the court-appointed appraiser in a sealed envelope for the court's consideration.* At no point in time would the amount of the appraisal be revealed to the public. In doing so, the integrity of the judicial sale process is preserved.

[19] *The duty of the Sheriff is to realise the highest price from the sale for the benefit of all interested parties* (*The Silia* [1981] 2 Lloyd's Rep 534 at 535; The Margo L). […] (emphasis added)

[57] In this regard, the processes of conducting an appraisement, advertisement and receipt of sealed bids have been complied as follows:

(i) *vide* encl. 89, M3ME was appointed as the surveyor and appraiser for the vessel. M3ME has surveyed and appraised the vessel on 14 December 2022 and the survey and appraisal report was provided to the sheriff on or about 21 December 2022 on a confidential basis.

(ii) *vide* encl. 102, this court ordered, among other things, that notice in relation to the sale of the vessel be advertised at least once in "The Star", "Lloyds List" and "TradeWinds" and that the advertisement shall be published not less than seven days before the tender closing date. The advertisements were duly published in the respective publications.

(iii) by the deadline for receipt of bids at 5pm Malaysian time on 7 February 2023, a total of six sealed bids were received. During the 9 February 2023 appointment, the survey and valuation were unsealed and the bids were read and recorded as follows:

No.	Bidder Name	Bid Amount
(i)	Khoshee Auctioneers Sdn Bhd	RM1,200,000.00
(ii)	Petro Hulu Sdn Bhd	RM2,123,000.00
(iii)	Anjur Ekar Sdn Bhd	RM6,496,500
(iv)	Aussie Offshore Pte Ltd	RM6,562,697.00
(v)	ARC Offshore India Pte Ltd	RM6,399,999.00
(vi)	Sea Bright Sdn Bhd	RM2,759,900.00

(iv) however, it was informed by the sheriff to the plaintiff's solicitors that even the highest bid of RM6,562,697 from Aussie Offshore Pte Ltd did not meet the market valuation of the vessel as contained in the survey and valuation.

(v) thereafter, *vide* encl. 112, this court ordered, among other things, that the sheriff be at liberty to receive a second round of bids (or as many rounds of bids thereafter as may be deemed necessary by the sheriff) in respect of the sale of the vessel and bunkers. This court also ordered that notice in relation to the sale of the vessel be advertised at least once in "The Star", "Lloyds List" and "TradeWinds" and that the advertisement shall be published not less than seven days before the tender closing date. The advertisements were duly published in the respective publications.

(vi) however, by the deadline for receipt of bids at 5pm Malaysian time on 30 March 2023, only one bid was received. During the 5 April 2023 appointment, the bid was read and recorded as follows:

No.	Bidder Name	Bid Amount
(i)	Era Sureway Sdn Bhd	RM2,500,000.00

(vii) the bid of RM2,500,000 by Era Sureway Sdn Bhd also did not meet the market valuation of the vessel as contained in the survey and valuation.

[58] Given that the bids across the first and second rounds of tenders did not meet the market valuation of the vessel as contained in the survey and valuation, the vessel has yet to be sold by the sheriff and as such, continues to incur sheriff's costs for maintenance of the same. It is in the best interest of all parties (including to avoid incurring further sheriff's costs and for the maintenance of the vessel), that the vessel should be sold to the highest bidder across the first and second rounds of tenders *ie*, at an undervalue.

[59] In *The Turtle Bay*, the Singapore High Court held as follows in respect of a sale at an undervalue:

> [22] The power of the court to sell a vessel under arrest after judgment *in rem* is obtained against that vessel is well established. *I have referred to the court's discretion with respect to the confirmation of judicial sales, in particular, where the highest bid price received by the Sheriff was below the appraised value (see [18] above). In one sense, such an application to sell below the appraised value is illustrative of the function of a judicial sale in which two competing concerns in a judicial sale are balanced: that of accepting the highest bid price at a fairly conducted Sheriff's sale on the one hand, and weighing that concern against the purpose to be achieved by a judicial sale, which is to benefit all persons interested in the res on the other (see [15]-[17] above).* There is no doubt that the court has discretion to refuse to confirm a judicial sale below the appraised value where the disparity between the highest bid price and the valuation of the court appointed appraiser is so great as to possibly result in a sale that is relatively cheap and, on its face, prejudicial to the other *in rem* creditors and the defendant ship owner. The unfettered discretion

to refuse the bid price could be exercised even in the absence of evidence suggesting that the sale was conducted unfairly or that a higher realisable sale price was possible. (emphasis added)

[60] The Singapore High Court considered that there are two competing concerns in a judicial sale which must be balanced:

(i) to accept the highest bid price at a fairly concluded sheriff's sale on the one hand; and

(ii) weighing that concern against the purpose to be achieved by a judicial sale which is to benefit all persons interested.

[61] *The Turtle Bay* was a case where the mortgagee applied to the court for approval of a private direct sale where the ordinary process of conducting an appraisement, advertisement and receipt of sealed bids was not followed. Therefore, the *ratio* in *The Turtle Bay's* case wherein the court refused to allow private direct sale can be distinguished from the present case because herein two rounds of tenders have been conducted and what the plaintiff is seeking for is for a sale to the third highest bidder (and presently, the highest bidder that remains interested to purchase the vessel) across the first and second rounds of tender.

[62] Applying the *dicta* in *The Turtle Bay*, I accept the submission of learned counsel for the plaintiff that the balance tips in the favour of granting the application for a sale at an undervalue to ARC Offshore India because:

(i) the commission, advertisement and bidding process were fairly conducted. In this regard:

(a) a qualified surveyor and appraiser, *ie*, M3ME, was duly appointed *vide* encl. 89 to conduct the survey and appraisal;

(b) for both the first and second rounds of tenders the advertisements were widely published in three reputable publications (one local and two international), and each advertisement was published in good time pursuant to requirement in encls. 102 and 112 *ie*, not less than seven days before the respective tender closing dates; and

(c) during both the first and second rounds of tenders, sealed bids were received; and

(ii) it is in the best interest of all parties for a sale to be made to ARC Offshore India because:

(a) the objective and empirical evidence of the market for the vessel is before this court. The evidence shows that the realistic value of the vessel lies between RM6,399,999 to RM6,562,697;

A (b) the plaintiff has also adduced expert evidence from Mr. Patrick Forinton, a professional shipbroker focused in the secondhand sale and purchase markets for vessels. Mr Forinton has opined that there is little value in proceeding to a third round of tenders as it is unlikely that a higher price will be fetched. In this regard, Mr Forinton has opined, among others, as follows:

B

> 19. The top three bids received in the first round therefore reflect approximately the upper bounds of the market price for the Vessel in the short term. The lower bids appear to be valuing the Vessel as scrap since scrap steel price is at about USD560 per light displacement tonnage the measure of the amount of steel in a vessel) and the Vessel is expected to be about 1,000 LDT. The fact that potential bidders are bidding for the Vessel with prices at scrap value levels indicates that some parts of the market do actually believe that the Vessel's life cycle and employment utility is spent.
>
> **Summary of Conclusions**
>
> 20. *My opinion is that, it is highly unlikely that in a 3rd round of bidding for the Vessel, that a bid for India Vessel (sic). The Vessel has already been widely advertised and marketed in broker channels and there is little more that can be done to improve the Vessel's sale prospects.*
>
> 21. Notwithstanding the usual standards of "Fair Market Value" and "Forced Sale Value" used by appraisers, where it has already been demonstrated that there are simply no willing buyers in the market prepared to pay these prices, *exposing the Vessel to further round(s) of bidding is unlikely to result in higher or better offers.*
>
> (emphasis added)

F (c) even if the vessel receives a bid of RM6,562,697 in a third round of tender, the additional RM162,698 will not bring any benefit to the body of creditors because it will be used for the maintenance of the vessel while awaiting the completion of the third round of bidding;

G (d) each round of bidding takes approximately two months to complete as evident from the time taken from the opening of the bids received during the first round of bidding on 9 February 2023 to 5 April 2023 – the date when the bid received during the second round of bidding was opened. The costs of basic maintenance for the vessel for a further two months on a conservative estimate are as follows:

H

I

S/N	Description	Rate	Total for 2 months	Supporting documentation
1.	Bunkers	RM3,210.66 per day Based on RM137,600 for 30 m^3 with daily minimum consumption rate 0.7 m^3 (subject to fluctuations/ increases to the price of bunkers)	RM192,639.60	(1) Daily reports from the Vessel for 5.4.2023 to 25.4.2023; and (2) Quotation from the Sheriff's Agent dated 8.3.2023.
2.	Insurance	USD 5,000 (approximately RM22,300) per month based on USD1 = RM4.46)	RM44,600	Invoice from QBE Insurance (Malaysia) Berhad dated 4.4.2023
3.	Crew Wages	USD36,120.00 per month (approximately RM161,095.20 based on USD1 = RM4.46)	RM322,190.40	Ship Manager's expenditure report for February 2023
4.	Fresh Water	RM19,550.00 per month	RM39,100.00	
5.	Food & Provisions	RM37,711.05	RM75,422.10	Invoices from the Sheriff's Agent dated 8.3.2023 and 14.3.2023
		Total	**RM673,952.10**	

(e) in addition to the costs of maintaining the vessel must be added the advertising costs for a third round of bidding:

S/N	Description	Amount
1.	The Star	RM4,884.50
2.	Lloyd's List	GBP 3,870 (approximately RM21,524.39 based on GBP 1 = RM5.5619)
3.	Tradewinds	USD5,968.50 (approximately RM26,619.51 based on USD1 = RM4.46)
Total		**RM53,028.40**

(f) therefore, in order for a third round of bidding to be beneficial to the body of creditors, there must be bids of at least RM7,126,979.50 (*ie*, RM6,399,999 + RM673,952.10 + RM53,028.40). Even if a third round of bidding takes half the time to complete, to even maintain the current level of proceeds for the body of creditors, a bid of RM6,763,489.25 must be received in the third round. Given Mr Forinton's opinion, this is unlikely to occur. Notably, the defendant has not filed any affidavit to rebut the expert evidence of Mr Forinton. In this regard, the defendant is deemed to admit the expert evidence of Mr Forinton per *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281.

(g) finally, ARC Offshore India may not return to the table in the third round or maintain its bid of RM6,399,999, thereby losing even this level of recovery for the body of creditors. As the second round of bidding demonstrates, the trend is instead for bidders for the vessel to enter substantially lower bids.

(h) the same reasoning also applies in respect of the purported "offer" that the defendant mustered from ProActive Ship Management, bearing in mind that the "offer" would have to be dealt with in the context of a third round of bidding because ProActive Ship Management has never entered a bid for the vessel in any of the sheriff sanctioned rounds of bidding. Any attempt to seek this court's leave to accept the "offer" of ProActive Ship Management would be tantamount to a private sale.

(i) the purported "offer" is vague, qualified and conditional. In exh. "LE1" to encl. 121, it is stated that the "offer" at RM7 million is merely an "indicative sum" and a "range". On the face of the "offer", there is no binding obligation, much less a guarantee that ProActive Ship Management will bid for the vessel and at the price of RM7,000,000.

(j) however, even if we assume that ProActive Ship Management would enter a bid of RM7,000,000 for the vessel in a third bidding round, there is unlikely to be any net benefit of opening a third bidding round for the vessel because the costs of maintaining the vessel will exceed any benefit from the increased price for the following reasons:

(1) almost two months have passed since the bid received in the second bid round was unsealed on 5 April 2023. In this period, the vessel has incurred about RM673,952.10 in basic maintenance costs for bunkers, crew wages, insurance, victuals and freshwater;

(2) the timeframe to complete a bidding round is about two months. If a bid of RM7,000,000 is below the appraised value, an application for the leave to be granted by this court for the vessel to be sold under the appraised value will be necessary and this process may take at least one to two months;

(3) additionally, the time to completion once a bid is accepted is ten Kuala Lumpur working days or roughly two weeks;

(4) in light of the above, it would realistically take about 3.5 to 4.5 months to sell the vessel based on the defendant's proposal to allow a third bidding round to be opened. The additional basic costs for maintaining the vessel for four months are approximately RM1,347,904.20 (RM673,952.10 x 2). The costs for advertisements for a third round of bidding must also be factored in and this is estimated to be about RM53,028.40;

(5) as such, for any bid received during the third round to be worthwhile, it must be at least RM8,474,883.70 (*ie*, RM6,399,999 + RM673,952.10 + RM53,028.40 + RM1,347,904.20);

(6) for this court to call for a third round of bids, there must be a prospect that the third round will attract bids that have a net benefit to the body of creditors considering the costs incurred and to be incurred in calling for a third round. However, no such prospects exist here; and

(7) in this regard, the "offer" from ProActive Ship Management will not benefit the body of creditors because it will not cover the additional costs incurred. A mere increase in price by RM600,001 will result in a negative impact of RM1,474,883.70 for the body of creditors.

(iii) in light of the above, it is the judgment of this court that it is in the best interest of all parties for this court to direct the sheriff to accept the bid received from ARC Offshore India while the offer is still open.

Conclusion

[63] In conclusion, this court holds that the sheriff has powers to sell the vessel to ARC Offshore India for the sum of RM6,399,999 which is below the appraised value of the ship as the offer is still valid, open and capable of acceptance. It would be in the best interest of all parties for this court to sell the vessel below its appraised value to ARC Offshore India.

[64] Accordingly, this court grants the order in terms of encl. 118.